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Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-812

MICHAEL J. CODD, Police Commissioner, City of New York, PATRICK V. MURPHY, Former Police Commissioner, City of New York, THE CITY OF NEW YORK, HARRY I. BRONSTEIN, Personnel Director and Chairman, New York City Civil Service Commission, and ABRAHAM D. BEAME, as Comptroller, City of New York,

Petitioners,

—v.—

ELLIOTT H. VELGER,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' BRIEF

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Opinions Below

The opinion of the Court of Appeals (117a-125a)* is reported at 525 F.2d 334. The opinion and judgment of the United States District Court for the Southern District of New York (Werker, J.) (109a-114a) granting judgment to the defendants is not officially reported. An earlier opinion of the District Court (Gurfein, J.) (32a-40a), denying motions to convene a three judge court and to dismiss the complaint, is reported at 366 F. Supp. 874.

Jurisdiction

The judgment of the Court of Appeals was entered September 9, 1975 (117a). The petition for a writ of certiorari was filed December 6, 1975, and was granted on June 28, 1976. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

Questions Presented

1. Is a public employer, in particular, a police agency, constitutionally required to afford a probationary employee a hearing prior to termination where there is derogatory and possibly stigmatizing material in his personnel file which will be revealed to a prospective employer only with the written permission of the employee?

2. Where it is undisputed that a probationary policeman put a gun to his head while in training, must he be ordered reinstated merely because the incident was revealed to a prospective employer and prior to his termination he did not receive a hearing?

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* Numbers in parentheses followed by "a" refer to pages of the Appendix filed with this Court.

Statement

This is a civil rights action brought pursuant to 42 U.S.C. §1983. The plaintiff (here respondent), Elliott H. Velger, was appointed as a New York City probationary patrolman on August 15, 1972 (49a). The Police Commissioner, having found his performance unsatisfactory, ordered his services terminated effective February 16, 1973 (50a). In accordance with standard procedures as to probationary employees, plaintiff did not receive a hearing prior to dismissal nor was he apprised of the reasons for his termination (13a, 50a).

On May 25, 1973, plaintiff commenced this action in the United States District Court for the Southern District of New York to have his dismissal vacated and annulled, to enjoin the defendants from refusing to employ him and for damages caused by injury to his reputation (5a-15a). Defendants moved to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted (16a-17a).

In July, 1973, plaintiff moved for an order convening a three-judge court to declare section 63 of the New York State Civil Service Law, which mandates probationary periods for employees, unconstitutional (2a). Judge Gurfein denied the motion to convene a three-judge court on the grounds that substantial questions of constitutionality were not included in the complaint and because the Court of Appeals for the Second Circuit, in *Russell* v. *Hodges*, 470 F. 2d 212, 218 n. 6 (1972), had already decided that such a contention was "frivolous" (36a). He determined that plaintiff, as a probationary employee, had no property interest in not being terminated such as would require a hearing (37a-38a). However, he permitted the filing of further affidavits and the amendment

of the complaint to incorporate the plaintiff's new charge that he had been denied employment opportunities because of derogatory material in his personnel file which he had never seen or been allowed to refute (39a-40a). Thereafter, on March 13, 1974, plaintiff filed an amended complaint (3a, 46a-56a).

On November 25, 1974, a hearing was held before Judge Werker on the issue of whether the plaintiff had been stigmatized and foreclosed from employment opportunities because of the personnel file compiled by the Police Department (64a-108a). The hearing disclosed, and the District Court found (112a), that the plaintiff had been terminated from a job as a Penn Central security officer after a Penn Central captain, with the plaintiff's authorization, saw his New York City Police Department personnel file and gleaned from it that he had been terminated because he had put a revolver to his head in an apparent suicide attempt.* There was also evidence that petitioner had unsuccessfully sought security officer positions in the private sector and had taken and passed civil service examinations for the position of police officer, but had not been appointed. However, no proof was submitted that in fact other prospective employers had examined plaintiff's file.

The District Court concluded that the plaintiff (113a-114a):

> "has not established that information about his Police Department service was publicized or circulated by defendants in any way that might reach his prospective employers; in the one instance in which such information did reach an employer, it did so through plaintiff's own authorization. Plaintiff has not established that unfavorable information in his police record was released to any of the governmental agencies to which he has applied for employment. Lastly, plaintiff has not established or even attempted to show that those agencies have relegated his applications, for any reason whatsoever, to ineligible status. Plaintiff, in short, has not sustained his burden of proof."

* The plaintiff has never denied that he put a gun to his head. All that he claimed in his brief to the Court of Appeals (p. 16) was that he should have been permitted to "explain" the "alleged incident": "It might all have been a mistake. It could also have been a little horseplay."

The Court of Appeals rejected as "clearly erroneous" the District Court's finding that the plaintiff had not proved stigma (125a) and found that "the manner in which personnel records are made available to inquiring public and private employers insures that serious derogatory information in the file will stigmatize the dischargee" (124a). The Court refused to attach any significance to the Department's requirement that Penn Central, a private employer, present written authorization from the plaintiff before it would release his personnel files, on the ground that, if authorization were refused, the applicant would be denied employment (123a).*

* We annexed to our brief in the Court of Appeals the text of a directive from Police Commissioner Michael J. Codd, dated April 2, 1975, which states that: "In any case where a probationary employee of this Department is terminated, access to his personnel file by any prospective employer, private or governmental, will be granted only upon the probationary employee executing a written authorization for such prospective employer to inspect his file."

ARGUMENT

There was no public disclosure of the reason for plaintiff's discharge at the time he was terminated. Accordingly, he was not unlawfully deprived of liberty by being discharged without a hearing. Furthermore, he does not deny having committed the act for which he was discharged, and, on this ground as well, no hearing should have been ordered.

(1)

In *Board of Regents* v. *Roth,* 408 U.S. 564 (1972), this Court set forth guidelines for determining when a public employee is entitled to a trial-type hearing prior to termination of his employment. It held that procedural due process applies only when the interest in continued employment is within the Fourteenth Amendment's protection of liberty and property.

More recently, this Court has held that there was no deprivation of liberty where a public employee, a police officer, whose position was terminable at will was discharged without a hearing, but there was "no public disclosure of the reasons for the discharge." *Bishop* v. *Wood,* —— U.S. ——, 96 S. Ct. 2074, 2079 (1976).

In the case at bar, there was no "public disclosure" of the reasons for plaintiff's discharge. Indeed, no reason at all was given to plaintiff or anyone else, and access to his personnel file was allowed only pursuant to his express written authorization, and under circumstances where, even absent such authorization, the common law has long recognized a qualified privilege (see PROSSER, Law of Torts [4th Ed. 1971], pp. 789-792). Cf. *Bishop* v. *Wood, supra,* 96 S. Ct., at 2079-2080. No effort was made by the Police Department to blacklist plaintiff or to circulate

derogatory information about him. On the contrary, here, by virtue of plaintiff's execution of an authorization allowing officials of Penn Central to examine his file, it was he, not the Police Department, who was responsible for "publication" of this material. Moreover, this publication did not take place "until after [plaintiff] had suffered the injury for which he seek redress." *Bishop* v. *Wood, supra,* 96 S. Ct. at 2079.

Clearly, there was here no widespread dissemination of derogatory information which "might seriously damage [plaintiff's] standing and associations in his community . . ." *Board of Regents* v. *Roth, supra,* 408 U.S. at 573. And, while it is true such a limited publication made to a new or prospective employer following discharge might well affect the discharged employee's ability to keep or gain new employment, it is significant in terms of the *Roth* analysis that here the alleged defamation did not "occur in the course of the termination of employment." *Paul* v. *Davis,* —— U.S. ——, 96 S. Ct. 1155, 1165 (1976). Accordingly, it should not be held "to provide retroactive support for his claim." *Bishop* v. *Wood, supra,* 96 S. Ct., at 2079-2080.

Just as *Bishop* v. *Wood* indicated (*id.,* p. 2080) that "forthright and truthful communication" between employers and employees and between litigants should not be penalized, so also forthright and truthful communication between past and present or prospective employers should not be penalized. Surely, it should not be penalized in the case of sensitive areas of government such as the police and other investigative agencies.

(2)

Under the ruling of the court below, even where a former probationary employee executes a written release authorizing a prospective employer to see his personnel file, the Police Department must not allow the file to be released if the former probationary employee had not been given a hearing on stated charges prior to his termination. New York State law does not require such a hearing for termination of probationary employees (see *Talamo* v. *Murphy*, 38 NY 2d 637, 345 N.E. 2d 546 [1976]), and both *Roth* and *Bishop* v. *Wood* make clear that under the Constitution a public employer ordinarily has the right to terminate, without a hearing, employees who do not have State law tenure rights or contract rights in continued employment. Nonetheless, the practical result of the Court of Appeals' decision here is to require that public employers afford all their employees (probationers, provisionals, and those exempt from the civil service rules, as well as tenured civil servants) a hearing on stated charges prior to termination, or else be precluded from disclosing information about former non-tenured employees even where the former employees desire and authorize such disclosure. This can have only untoward consequences.

By way of illustration, we ask the Court to consider the situation of a Justice of this Court, with a confidential clerk who has no property interest in his job and who proves unsatisfactory because, for example, the Justice believes the clerk has disclosed the Court's decision on a still pending case. The Justice decides to terminate the clerk. He must then decide whether to hold a full-scale hearing on stated charges, for, if he does not, should his former clerk apply for a position with another judge, he will be barred from revealing anything whatever about the former clerk's behavior; indeed, he might even be

barred from refusing to respond to such inquiries. This would be so even if the fact of the disclosure was undisputed. We submit that *Roth* does not require such a result and should not be so extended.

Moreover, the decision below is especially unfortunate in its application to a police agency. To require the New York City Police Department to withhold information about a former employee from other police agencies who are considering hiring him, arming him and assigning him to the sensitive tasks of a police officer, where that former employee has himself authorized disclosure, imposes an undue restriction on the Department in the fulfillment of its obligations to the public. Here, the former employee does not deny that while a trainee he put a gun to his head; and there can be no doubt that such an act is a constitutional basis for termination of his probationary employment. The Department should not be barred from disclosing its files to other police agencies with the former employee's permission.

The rule which we urge here is not inconsistent with this Court's decision in *Roth*. It does not allow unfettered freedom to publish derogatory information about former employees—in the case of excessive publication of such information or publication for malicious reasons, the former employee would have available to him his state law remedies for defamation. Cf. *Bishop* v. *Wood, supra,* 96 S.Ct., at 2080; *Paul* v. *Davis, supra,* 96 S.Ct., at 1165-1166.

Rather, under the rule which we urge all that would be allowed would be very limited disclosure pursuant to express authorization by the former employee. On balance, we submit, this adequately protects the interests sought to be protected by *Roth* and at the same time protects the interests of public employees and society in general.

(3)

The State of New York has pioneered in civil service reform. The requirement of appointment on the basis of merit and fitness is embodied in the State Constitution (Article 5, §6), and has been there since 1894 (Constitution of 1894, Article 5, §9 [See Historical Note, McKinney's Consol. Laws of New York, Constitution, Article 5, §6 Book 2 (1969), p. 200]). Once tenured, a civil servant in New York enjoys strong job protection (see Civil Service Law, §75), and, in the case of tenured police officers, proceedings to remove such employees for misconduct have been analogized by the New York courts to criminal proceedings (see *Evans* v. *Monaghan*, 306 N.Y. 312, 319-320, 118 N.E. 2d 452, 455 [1954]). See also Frug, "Does the Constitution Prevent the Discharge of Civil Service Employees," 124 U. of Pa. L. Rev. 942, 944-946, 1008-1010 (1976) (discussing generally the problems, from a government management standpoint, involved in removing unfit employees and restricting tenure protection to the truly qualified).

Not only is it difficult to terminate an unsuitable officer once he is granted tenure, but also such an officer poses a direct threat to himself as well as others, and, for failure to terminate such an officer, the City may itself be cast in liability for injuries to others. See, *e.g.*, *McCrink* v. *City of New York*, 296 N.Y. 99, 71 N.E. 2d 419 (1947).

Under these circumstances, the responsibility of the Commissioner in deciding whether to retain or terminate a probationary police officer is, if not awesome, at least most grave. Quite appropriately, New York law places broad discretion in the appointing officer in this regard (see *Talamo* v. *Murphy*, *supra*). Such discretion should not be inhibited by requiring a pretermination hearing where termination is not accompanied by public disclosure of stigmatizing material.

Similarly, for very much the same reasons, post-termination disclosure to other security agencies of the reasons for termination should not be barred, especially where the discharged employee has himself authorized such disclosure.

(4)

Finally, we would note that in this case the requirement of a hearing makes no sense at all, for plaintiff does not deny that he committed the act for which he was fired. Instead, he as much as admits that he put a gun to his head, but urges that this might have been horseplay or the like (92a, 95a). Whatever the reason for such conduct, surely a police department does not have to tolerate it in its employees. In the case of a tenured employee, this would constitute a fully sufficient ground for dismissal following a hearing; in the case of an employee terminable at will, no hearing at all should be required where such conduct is admitted. If the injury complained of here is properly to be viewed as a species of defamation, certainly admitted truth should be accepted as a complete defense to the complaint.

CONCLUSION

The judgment of the United States Court of Appeals for the Second Circuit should be reversed and the complaint ordered dismissed.

September 3, 1976

Respectfully submitted,

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